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In the Supreme Court of the United States

OCTOBER TERM, 1977

CADILLAC OVERALL SUPPLY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-25a) is reported at 568 F. 2d 1078.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1978. The petition for a writ of certiorari was filed on March 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging that the defendants allocated among themselves customers whom the defendants supplied with industrial rental garments that

the defendants had purchased from out-of-state sources sufficiently alleged a restraint of interstate commerce in violation of Section 1 of the Sherman Act.

2. Whether the evidence supports the district court's finding that petitioner's violation occurred in interstate commerce.

3. Whether the evidence supports the district court's finding that petitioner participated in the conspiracy to allocate customers.

4. Whether the acts of corporate employees authorized to manage the business may be attributed to the corporation.

5. Whether an agreement by competitors to allocate customers among themselves constitutes a *per se* violation of Section 1 of the Sherman Act.

6. Whether the trial court properly denied petitioner's request to examine the prosecutor's witness interview summaries.

7. Whether the trial court correctly admitted into evidence statements of co-conspirators.

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

STATEMENT

In January 1976, a grand jury in the United States District Court for the Southern District of Florida indicted petitioner, a uniform supply company, four other corporations, and four individuals on a single count of conspiracy to restrain trade in the supply of industrial rental garments, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (Pet. 6; Pet. App. 34a-39a). All defendants except petitioner pleaded *nolo contendere* (Pet. 7).

The evidence at trial is summarized in the court of appeals opinion (Pet. App. 3a-5a, 16a-18a). It showed that for more than ten years certain industrial uniform rental companies in Florida agreed to allocate customers and to refrain from full competition with each other (*id.* at 3a-4a, 16a). Under the agreement, those companies refrained from soliciting each other's customers and each company would actively discourage the dissatisfied customers of other members of the conspiracy from changing suppliers (*id.* at 4a, 16a-18a). A conspirator contacted by a prospective customer who was dissatisfied with his existing supplier would call that customer's supplier, inform the supplier of the customer's complaint, and discourage the customer from changing suppliers, often by quoting a price higher than the company was then charging (*id.* at 4a). If the customer insisted on changing suppliers, the manager of the company receiving the account would trade accounts with the prior supplier until the volume of business exchanged was equal (*ibid.*).

The evidence of petitioner's participation in the conspiracy included testimony by employees of other companies concerning numerous conversations and transactions with two of petitioner's managers in Florida, in furtherance of the customer allocation scheme (Pet. App. 16a-18a).

The evidence also included a stipulation between the government and petitioner that petitioner "has regularly purchased substantial quantities of industrial garments for its Florida Division from companies located in [other states]" (Pet. App. 32a).

Following a non-jury trial, petitioner was found guilty and fined $5,000 (Pet. App. 1a). The court of appeals affirmed, rejecting each claim advanced in the petition (Pet. App. 2a-25a).

ARGUMENT

The court of appeals correctly rejected each of petitioner's claims. Moreover, those claims raise primarily factual issues limited to this case, involve no conflicts among the courts of appeals, and do not warrant this Court's review.

1. The court of appeals correctly rejected as "meritless" (Pet. App. 7a) petitioner's claim that the indictment failed adequately to allege a restraint of interstate commerce (Pet. 18-21). A conspiracy in restraint of trade violates the Sherman Act if it either occurs in the flow of interstate commerce or substantially affects such commerce. *E.g., Burke* v. *Ford,* 389 U.S. 320, 321. The indictment charged that the conspirators regularly purchased, or otherwise obtained supplies, materials and industrial garments that were manufactured outside the State of Florida, and that "during the period covered by this Indictment, there was a continuous and uninterrupted flow of industrial garments [and materials]" from the out-of-state sources to the defendants and to their customers (Pet. App. 37a, para. 6).

The court of appeals correctly held that "the indictment sufficiently alleged a restraint on interstate commerce under the 'flow of commerce' theory" (Pet. App. 6a). As the court observed, the language of the indictment informed petitioner of the elements of the offense, safeguarded its rights not to be twice placed in jeopardy for the same offense, and provided sufficient information to allow petitioner to prepare an adequate defense (*ibid.*). Nothing more is required of an indictment. *Hamling* v. *United States,* 418 U.S. 87, 117.[1]

2. Petitioner also contends that the evidence was insufficient to establish that the conspiracy occurred in or substantially affected interstate commerce (Pet. 21-34). Its principal argument is that there was not a continuous flow of garments from petitioner's out-of-state suppliers to its ultimate rental customers in Florida; rather it claims that its business "has two separate and distinct aspects" (Pet. 23)—first, the acquisition of garments and supplies from out-of-state and second, the furnishing of those garments to its local customers (Pet. 21-29). Petitioner claims that only the first aspect involves the flow of interstate commerce, that that flow ceases when the

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[1]As the court of appeals also noted (Pet. App. 6a), petitioner has not shown (or even claimed; see Pet. 18-21) that the language of the indictment impaired its ability to understand or defend against the charges.

Although petitioner relies on *United States* v. *Allied Maintenance Corp.,* 1976-1 CCH Trade Cases p. 69,027 (S.D.N.Y.), the court below correctly declined to follow that case on the ground that there the district court "substituted its prediction of the outcome on the merits rather than determining whether the allegations, accepted as true, stated a violation of the Sherman Act" (Pet. App. 7a).

garments are placed in its Florida warehouse, and is not connected with the subsequent local distribution of those garments.

The court of appeals correctly characterized petitioner's argument as "a theoretical and unrealistic view of Cadillac's business. The record contains no evidence to rebut the conclusion that Cadillac's entire Florida operation was conducted as a single integrated whole" (Pet. App. 9a). Rather, the evidence showed that petitioner purchased garments from out-of-state sources for the purpose of supplying its local customers and in response to customer orders (Pet. App. 9a, 32a). The fact that the goods may have been temporarily warehoused does not terminate the flow of commerce in those goods (see, *e.g.*, *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 568), or convert petitioner's integrated business into "two * * * completely separate and independent operations" (Pet. (Pet. 24).[2]

3. There is also no merit to petitioner's claim (Pet. 35-36) that the evidence was insufficient to support the finding that petitioner participated in the conspiracy. The evidence of petitioner's participation included testimony by employees of other members of the conspiracy concerning their conversations and transactions with three of petitioner's managers in Florida (who were stipulated

[2]The proof that the conspiracy occurred in interstate commerce makes it unnecessary to consider the alternative basis of Sherman Act jurisdiction—that the conspiracy substantially affected interstate commerce. In view of the stipulation that petitioner purchased over one hundred thousand dollars of supplies from out-of-state sources in each of the years 1970 through 1972 (Pet. App. 8a), the court of appeals also correctly rejected petitioner's claim (Pet. 29-34) that the evidence was insufficient to establish a substantial effect on interstate commerce.

to have held the position of petitioner's "Florida Division Manager" (Pet. App. 33a)) in furtherance of the allocation scheme (see Pet. App. 16a-17a). As the court of appeals stated (Pet. App. 18a). "T]here was much more [evidence] than the necessary 'slight evidence,' to support the finding of the trial court." There is no need for further review of that conclusion. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

4. Petitioner urges (Pet. 36-40) that it cannot be held liable under the Sherman Act for the acts of its Florida managers. However, at trial petitioner stipulated that those managers were given " 'direct responsibility for all of [petitioner's] sales and operations in South Florida' " and the evidence at trial demonstrated that those managers had authority to accept, solicit, and exchange customers accounts (Pet. App. 24a). This evidence is sufficient to render the corporation criminally responsible for its employees' criminal acts. *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 125-126; *New York Central & Hudson River R. Co.* v. *United States*, 212 U.S. 481, 493-496; *United States* v. *Hilton Hotels Corporation*, 467 F. 2d 1000, 1005 (C.A. 9), certiorari denied *sub nom. Western International Hotels Co.* v. *United States*, 409 U.S. 1125; *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 204-205 (C.A. 3).

Petitioner relies on (Pet. 36-37) *United States* v. *Food and Grocery Bureau of Southern California, Inc.*, 43 F. Supp. 966 (S.D. Cal.) for the proposition that a principal may be held criminally liable for the acts of his agent only when the principal actively aided or encouraged the acts of the agent, and argues that the corporate principal cannot be held liable in this case because the corporate president did not authorize the acts of the Florida agents. The principle stated in *Food and Grocery Bureau* may

apply when the principal in question is an individual. (See cases cited by petitioner at Pet. 37) But when the principal is a corporation, which can act only through its agents, decisions of this Court and the courts of appeals indicate that a corporation is civilly and criminally liable "for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agents." *Hilton Hotels Corporation, supra,* 467 F. 2d at 1007, see also *United States* v. *A & P Trucking Co., supra; New York Central & Hudson River R. Co.* v. *United States, supra.* To the extent the decision in *Food and Grocery Bureau* applied a different principle to corporate defendants, it is contrary to the clear weight of authority.[3]

5. Petitioner contends (Pet. 40-46) that a conspiracy to allocate customers is not a *per se* violation of the Sherman Act. Petitioner cites no authority for this proposition, and it is contrary to principles established by this Court and the decisions of the courts of appeals that have ruled on this question. Thus, in *United States* v. *Topco Associates,* 405 U.S. 597, 608-612, this Court reaffirmed the principle that the horizontal division of markets by competitors is *per se* unlawful, and in so holding expressly condemned both allocation of territories and allocation of customers.[4] Other courts have

[3]The "corporations" whose motions to dismiss were granted in *Food and Grocery Bureau* were described by the court as "cooperatives" of numerous small merchants. 43 F. Supp. at 973.

[4]Petitioner errs in contending (Pet. 42) that the Court's remarks concerning customer restrictions were "gratuitous dictum." The Court held, 405 U.S. at 612: "We also strike down Topco's other restrictions * * * [which] amount to regulation of the customers to whom members of Topco may sell Topco-brand goods." Moreover, an allocation of customers by competitors is as much a horizontal division of markets as an allocation of territories.

also held that customer allocation agreements are *per se* unlawful. *United States* v. *Flom,* 558 F. 2d 1179, 1183 (C.A. 5); *United States* v. *Consolidated Laundries Corp.,* 291 F. 2d 563, 574-575 (C.A. 2). The court of appeals correctly followed those decisions.[5]

6. Petitioner contends (Pet. 46-48) that the government violated the Jencks Act, 18 U.S.C. 3500, in failing to furnish petitioner with interview summaries prepared by the prosecutor. But the district court determined that the summaries were not "statements" of the witness within the meaning of the Jencks Act (Tr. 426) and the record supports that determination.

Petitioner does not identify the "several occasions" in which "witnesses" (Pet. 46) allegedly ratified the prosecutor's recitation of their prior statements, and in its court of appeals brief petitioner discussed only one occasion in which a witness was asked to comment about the prosecutor's recollection of a prior interview with that witness (Br. 27). The record shows that on that occasion the witness, Mr. Brown, responded affirmatively to the prosecutor's recollection of statements made at an interview, but added "I don't believe I stated it in that manner" (Tr. 428), and the prosecutor did not refer further to his interview summary on the matter. Under those circumstances, the prosecutor's interview summaries cannot " 'fairly be said to be the witness' own [statement]' ". *Goldberg* v. *United States,* 425 U.S. 94, 107.

[5]Moreover, the court properly noted (Pet. App. 23a) that even if petitioner's proferred justification of the customer allocation agreement—the "protection of * * * contracts"—could be a defense to the restraint, the evidence did not support petitioner's explanation; the record indicated that contracts were not widely used in the industry until the grand jury began its investigation of the restraints (*ibid.*).

7. Finally, petitioner contends (Pet. 48-50) that there was insufficient independent evidence of the conspiracy to permit the admission of co-conspirator declarations. The record establishes otherwise. The evidence apart from the declarations of co-conspirators establishing petitioner's participation in the conspiracy included testimony by co-conspirators about numerous conversations with petitioner's agents and also business records reflecting the allocation scheme; both types of evidence are not excludable hearsay (see Fed. R. Evid. 801(d)(2)(D) and 803(6)) and are independently admissible. See also, *e.g.*, *Laughlin* v. *United States*, 385 F. 2d 287, 292 (C.A.D.C.), certiorari denied, 390 U.S. 1003; *Great Lakes Gas Transmission Co.* v. *Grayco Constructor's, Inc.*, 506 F. 2d 498, 503 (C.A. 6), certiorari denied, 420 U.S. 947. That independent evidence was sufficient to permit the admission of co-conspirator declarations in furtherance of the conspiracy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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